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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

FORT SMITH LIGHT & TRACTION COMPANY,
PLAINTIFF IN ERROR,

vs.

BOARD OF IMPROVEMENT OF PAVING DISTRICT NO. 16 OF THE CITY OF FORT SMITH, ARKANSAS,

DEFENDANT IN ERROR

BRIEF IN REPLY

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The Connecticut Case

The Connecticut Court (Fair Haven & W. Rd. Co. vs. New Haven, 75 Conn., 442), in sustaining the Act in question in that case on the reserve power to amend charters, did so on the ground that it was within the legislative power to impose reasonable regulations and requirements on a corporation operating a railway in a public street relating to the condition of the repair in which the street should be kept, and the improvements which shall be made therein for the convenience of travel, and the share of any burden incident thereto which shall be borne by the corporation(see quotation, page 10 of the Defendant in Error's brief).

This Court in sustaining this decision did so in these words: "Before granting this right the State certainly could have, and reasonably could have, put upon the company the duty of paving as well as of repairing. Such requirement would have been consistent with the object of the grant. It is yet consistent with the object of the

grant." (Page 12 of Brief of the Defendant in Error; taken from same case in this Court reported in 203 U. S., 379.)

Under the Constitution of Arkansas the Legislature could not have imposed this burden on this Company in favor of Improvement District No. 16, or any other improvement district. (We may add parenthetically that it could not have imposed it in favor of a municipality either, but as that question is not here, the power being exerted under the Act by an improvement district as the Act attempted to authorize, we confine the discussion to the improvement district's power to recover, as it is the only power involved herein.)

We have in our first brief given the Court the cases where the Supreme Court of Arkansas has held that the property of this particular company in the streets of Fort Smith was personal property and not subject to an assessment for public improvements, which under the Constitution of Arkansas can only be levied on real estate, and the character of its property in these streets was not real estate within the Constitutional meaning of that term authorizing the assessment of real estate in an improvement district. See our brief, pp. 39, 40.

We have cited the cases from that Court which hold that a privilege tax for the use of roads by vehicles can not be imposed in favor of an improvement district because the Constitution did not permit an improvement district to collect a privilege tax, and that Court further held that no species of personal property could be taxed to pay for a public improvement under the power of the Legislature to create improvement districts and levy assessments to pay for the improvement, and that improvement districts were incapable of having other sources of revenue than assessments on real estate, except donation of public funds raised under the taxing power from counties and municipalities (our brief, pp. 39-41).

We have shown further in our brief, pp. 60-64, that under the Constitution of Arkansas corporations can only be created by general law, and that corporate power can not be conferred by local or special acts.

The Supreme Court in this case, record pp. 41, 42, held that this Act was local, not a general one, therefore it was not within the power of the Legislature in the first instance to have imposed this burden on this Company as part of its charter through a local Act.

Therefore, viewing this legislation from every angle, it is seen that differing from the Connecticut situation the Arkansas Legislature could not have in the first instance, as the Connecticut Legislature could have done, imposed this burden through a local Act in favor of an improvement district.

It necesarily follows that it could not do in the guise of an amendment to a charter what it could not have accomplished in the first instance through a local Act.

Where such charges as these have been sustained it has been under the taxing power which expressly authorized it.

Thus Durham Public Service Co. vs. Durham, 109 S. E. Rep., 40, affirmed in this Court in 261 U. S., 149, was a case where the statutes of North Carolina expressly authorized local assessments upon street car companies for improvements in public streets, and Sioux City St. Ry. Co. vs. Sioux City, 138 U. S., 98, where a general statute of Iowa was sustained as an amendment to charters of corporations as a valid exercise of the taxing powers of the State.

In Arkansas as the taxing power can not be invoked against personal property to pay for public improvements constructed by an improvement district, and as an improvement district can have no source of revenue other than the assessments (save certain donations from municipalities or counties), and as under the Constitution of Arkansas no charter can be granted to a corporation by local or special Acts, it is the necessary consequence that the Legislature of Arkansas could not as a primary proposition in chartering this company to operate street railways in the city of Fort Smith have done what this local Act seeks to do, and which the Supreme Court sustained, as an attempt to amend its charter.

It may be added that the Connecticut Court in the case under review also sustained the Act as within the police power of the State, but this Court did not sustain it upon that ground. This leaves the Connecticut case, so far as our investigation goes, as the sole authority where such burden as the one imposed by this Act can be sustained under the police power.

In our brief, pages 46-68, we have collected the authorities to show that this burden can not be sustained under the police power. This we believe to be a sound general proposition, and the authorities that we there cite, we think sustain it as such, but whether a sound proposition generally or not, it is certainly true that in Arkansas an improvement district, from the very limited nature of the powers conferred upon it, as shown by the authorities which we cite in our brief, is incapable of having conferred upon it the police power of the State.

In this case the burden of paving had been assumed by this Company by contract in which enter the give and take equation.

On invitation of the State this contract was mutually rescinded. The Legislature attempted to replace the burden of the contract on the company without restoring to it the consideration for this burden—exclusive rights and the other benefits enumerated in our brief at page 16—and only seeks to replace the burden on one of the two companies operating under Indeterminate Permits, and upon only one of eight companies operating street cars in the State, thus seeking to amend this charter, and no other charters are amended.

In the Connecticut case the charter itself provided for its amendment, whereas in the Act providing for the Indeterminate Permit public utilities were left to be regulated solely under the police power, and later when the corporation was given the opportunity to regain their franchises and surrender their Indeterminate Permits the State obligated itself that should they retain their Indeterminate Permits they should be subject to regulation "in the same manner and to the same extent and with

like force and effect as in the case of other and like utilities." Appendix H, page 81 of our brief.

Turning to the facts an equally strong case is made of oppression and wrong as in the legislation itself. The principals of this improvement district—the abutting property owners—caused this street to be paved in 1912, through an improvement district then created by them as their public agent. To pave this street, the Company doing its part under its then contract with the city, cost it $50,000.00. The work done by this district was a poor job, resulting in the street going to pieces and materially injuring this Company in that it caused a squeezing of the pavement constructed by it, and the rails to spread, and other expenses and dangers of operation. Finally for the last several years the only passable part of the street was that constructed by this Company, and the public used that pavement almost exclusively. Instead of the Company having the exclusive use of it, as in the Connecticut case with the mule-drawn cars, the public enjoyed the benefit of this Company's work and had a good pavement to travel on.

Owing to the blunders of the former improvement district a new pavement of the street was required. It was questionable whether a repavement of the part done by the Company was required, and this repaving was done ten years or more prior to the time when it should have been repaved, precipitated by the blunders of the former district.

The abutting property owners when confronted with this situation created the present improvement district, the Defendant in Error, to repave the entire street, including that part of it which had been done by this Company. The assessments were levied to pay for the entire work before this Act was even introduced in the Legislature. The bonds were sold before it was passed.

The property owners got this Act passed, not to relieve the public, nor to pay for a public improvement; this improvement had already been provided for and charges for more than sufficient to pay for it in its entirety levied on the property. This Act was one solely to relieve the prop-

erty owners pro tanto for the expense of paving this part of the street which had been formerly paved by the Company and which was in usable condition at the time.

It is true that this pavement was not perfect when it was taken up and a new pavement made of it, but the witnesses for the Defendant in Error admitted that it was in better condition than the average brick pavement of about fifty miles in the city of Fort Smith and was in usable condition and constant use by the public generally.

Is it not sheer oppression and wrong for the Legislature to say that this corporation shall be singled out as the one street car company in the State to bear this burden, and that this one mile of brick pavement in the city of Fort Smith, laid at an expense of $50,000.00 by this Company, alone shall be repaved when there are fifty miles of pavement in the city not in as good condition as this was, in order to relieve the abutting property owners of that expense after they had created this district and assumed to pay this expense and for which the assessments had been duly levied before the Act was introduced in the Legislature?

The Fourteenth Amendment

Counsel, under this caption, argue as if our contention that this Act violated the Fourteenth Amendment was based on the theory that because the Company was losing money as now operated, that it is confiscation to put additional burdens on it.

Our argument, presented at pages 46-54 of our brief, is that this was arbitrary legislation against which the Fourteenth Amendment affords protection. They well say that this is not a rate case—brief, page 13—and we have not presented this phase of it as one determinable by the principles applicable thereto, but as one determinable by the principals enunciated in Cotting vs. Goddard, 183 U. S., 79, and the other cases cited—pages 49-55 of our brief.

It is no answer to the charge made, and as we believe sustained, that this is such arbitrary legislation, that the

regulatory authorities may increase the Company's rates to meet this expenditure. This is wholly beside the question, which is whether the legislation is arbitrary and discriminatory within the inhibitions of the Fourteenth Amendment. Moreover, rates must be reasonable, and even confiscation can not justify unreasonably high rates, and it is a fact known of all men that rates may be increased so greatly that they diminish revenues rather than augment them.

Suppose the regulatory authorities would increase the street car fare to 10 cents or 15 cents, or even higher, it would not increase the revenue of the Company, but would materially increase the revenue of the Ford Motor Company.

The cases referred to by counsel to the effect that the Legislature may shift the burden of paying for improved roads from land owners to the users of those roads through gasoline taxes are not analogous for several reasons. This legislation only shifts such burdens on one street car company in the State, leaving the patrons of the other seven companies unaffected, and the burden is not shifted to the users directly, but to the Company, and the Company can only reimburse itself, if at all, from its patrons. In either event it is the placing upon the Company or the patrons burdens not equally placed upon other companies, similarly situated.

Furthermore this is a burden which under the laws of Arkansas can not be imposed on patrons of street car companies any more than upon the Company itself in favor of improvement districts to help pay for the construction of a public improvement, as the only source of revenue of such district is real estate assessments and donations from municipalities and counties.

However, these questions are all inconsequential to the consideration of the arbitrary and discriminatory character of the Legislature itself, which we have discussed at too great length at pages 46-65.

The Indiana Case

Counsel seek a differentiation of the facts of this case from which we quoted at pages 35-37 of our brief; in the course of this discussion counsel say:

"The decisions of this Court are clear cut that whatever the precise limitations are to the reserve power, one of the limitations is that you cannot take the Company's property and give it to another.

"There is no similarity even, between legislation which takes away a company's property and gives it to another, and legislation which under the reserve power imposes the duty upon a street railway company of paving the actual portion of a street almost exclusively occupied by it." Defendant in Error brief, p. 16. We seek an application of this statement to the facts:

The abutting property owners by creating this improvement district, through it sought and obtained an assessment against their real estate to pay for all the paving, including that in controversy, and caused assessments to be levied on their real estate for more than enough to pay for all of it. They then sought and obtained this legislation, which would take $12,262.69 (R. p. 20) of the Company's money to pay on the assessments levied on their real estate which had been levied and was an existing lien before this Act was even introduced in the Legislature.

If this is not taking the Company's property and giving it to another, we will let counsel differentiate. Counsel in the above quotation repeats the situation of the Connecticut case, that the street railway was required to pave the part of the street "almost exclusively occupied by it." The record in this case reads:

"In recent years after the wooden block pavement became so bad, most of the traveling on Garrison Avenue was on the brick pavement put down by the Fort Smith Light & Traction Company. It was that part of the street that was in most general use by the public prior to the repaving in 1923." (R. p. 38.)

Yet to impose the burden of repaving this part of the street which was in most general use by the public upon this company the archaic condition of mule-drawn cars in Connecticut in 1893 is invoked in an effort to show that the Company had exclusive occupation of it.

The Acts of 1919 and 1921.

Counsel concede that when the Company took an Indeterminate Permit in lieu of its surrendered Franchises, that it constituted a contract between the Company and the State, the terms of which are to be found in the Act of 1919 (brief, p. 17). But they argue that there is nothing therein providing that the State did not agree to exercise its reserve right to amend the charter by requiring the Company to pave the streets upon which its lines ran, and further, that there is nothing in the statute agreeing that the State would not require the Company to pave.

Counsel invoke the statement in the Dutton case (263 U. S., 149) that the contract imposed no liability, and neither did it grant an exemption, and exemptions must plainly appear; but this was said of a contract between a company and a city in North Carolina, where the state law made street car property in streets (and its franchises) subject to assessment as abutting property owners to pay for local improvements, such as paving the streets (100 S. E. Rep., 40).

Necessarily under such law the Company would have to find an exemption in order to escape liability for the tax provided in general law, whereas in Arkansas exactly the opposite is the case; such property is not subject to such assessment or taxes.

> Fort Smith Light & Traction Co. vs. McDonough, 119 Ark., 158, reaffirmed in Slattery vs. Gregg, 129 Ark., 542.

Moreover in North Carolina the power was sustained under the "Sovereign power of taxation", whereas in Arkansas an improvement district can not be vested with this power.

> Whaley vs. Northern Road Imp. Dist., 152 Ark., 573.

Therefore this is not a case for the Company to show exemptions from taxation, but for the plaintiff to show authority for taxation.

At pages 19 and 20 counsel argue that Section 15 of the Act of 1921 (Appendix H, p. 81) was a mere declaration of the policy of the State, and subject to change, and did not constitute a contract. A review of the facts show otherwise:

In 1919 the State offered rescission of contracts by a surrender of franchises and acceptance of Indeterminate Permits by utilities, and this Company accepted the offer, surrendered its Franchise and took an Indeterminate Permit.

In 1921 the State offered to permit the utilities to retake their franchises and surrender their Indeterminate Permits, and stated its proposition thus, if the utilities did not retake their franchises they "shall be permitted to continue to operate under the same terms or conditions specified in said Indeterminate Permit, but subject however to regulation in the same manner and to the same extent and with like force and effect as in the case of other and like utilities." (Our brief, p. 81.)

Counsel admit, brief page 17, that when the Legislature in 1919 authorized the surrender of franchises and the taking of Indeterminate Permits when the utilities accepted, a contract was made.

We fail to see any reason why a similar contract was not made through the legislation in 1921. It is true, as stated by counsel at brief page 20, that the Act of 1921 was to prohibit any more Indeterminate Permits, and it offered an opportunity to the utilities to surrender those outstanding and retake their franchises. Should they retake their franchises, then they had inviolable contracts; and on the other hand the Legislature told them that if they retained their Indeterminate Permits they would only be regulated as other and like utilities.

It is not conceivable that the Legislature was holding out a promise to the ear to be broken to the hope,—"a

mere declaration of policy subject to change," as expresed by counsel at brief page 20.

The State was dealing with its public utilities, presumably in good faith, and doubtless would have kept the faith, but this bill was a local bill, and Senator Thompson testified that all local bills were passed on request of the Senator from the locality affected, but "a general bill was considered on its merits." (Rec. p. 24.)

Mr. Galloway, author of the bill in the House, testified to substantially the same fact (R. p. 23).

Counsel set out as an appendix section 25 of the Act of 1919, which shows that sections 14 and 15 of the Act of 1919 (our Appendix p. 80) were expressly repealed.

Section 14 was the section providing for issuance of Indeterminate Permits, and Section 15 for surrender of franchises and taking of Indeterminate Permits.

Now when these sections were repealed by the Act of 1921 the utilities holding the Indeterminate Permits had no legislative basis left for them, and they were ended, unless as a matter of law they were contracts not subject to alteration.

In order to avoid such a situation and not leave the utilities operating under them in the air, section 15 (our Appendix, p. 81) was passed expressly giving them life and stipulating that the holders of them should only be regulated in the same manner as other and like utilities were regulated. Certainly this constituted a contract.

We submit that this language from this Court through Mr. Justice Hughes in Russell vs. Sebastian, 233 U. S., 195, is applicable:

> "When the voice of the State declares that it is bound if its offer is accepted, and the question simply is with respect to the scope of the obligation, we should be slow to conclude that only a revocable license was intended. * * *
>
> "That the grant, resulting from an acceptance of the State's offer, constituted a contract, and vested

> in the accepting individual or corporation, a property right, protected by the Federal Constitution, it is not open to dispute in view of the repeated decisions of this Court."

Certainly the faith of the State was pledged to this Company that if it continued under its Indeterminate Permit, instead of retaking its franchises, that it would in future be regulated only in the same manner and to the same effect as other like utilities, and we submit that this constituted a contract. In violation of this pledge or contract, this Company is singled out as one of two companies having Indeterminate Permits and one of eight companies of other and like utilities, and a burden placed on it not placed upon any of these others.

The Facts

Counsel go into details of the condition of the paving when this work was done, but we are not interested in it in view of the facts heretofore quoted, that the public was using the part of the street constructed by this Company generally, instead of the balance of the street, and this further admitted fact, stated in the record:

"It is a fact that the brick pavement on Garrison Avenue done by the Company in 1912 was in better condition in 1923, when it was taken up and relaid, than the brick pavements in the city, on other streets, generally speaking, and there were about fifty miles of brick pavement on other streets in the city at that time.

"The brick pavement between the rails on Garrison Avenue was in fair usable condition when it was repaired in 1923, although Garrison Avenue outside of it was in horrible shape. Between the tracks was so much better than the other part of the street, which was wood block, that the traffic went upon it." (R. p. 39.)

These being the facts as to the local condition, we leave it to the Court's judgment—aside from all questions of law herein presented—that it is "sheer oppression and wrong" to require this Company to replace a pavement which was in better condition than the rest of the city—

fifty miles of it—so that the abutting property owners who created the Defendant in Error here, to repave all of this street, including this in controversy, and caused their property to be assessed for it, should, after doing so, have a credit on their assessment for the amount recovered of this Company through this Act, evidently passed as an afterthought to aid the property owners to pay for what they had already had their property assessed to pay for.

Respectfully submitted,

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